



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 24, 2013

Ms. Bettie L. Wells  
General Counsel  
Texas Board of Pardons and Paroles  
P.O. Box 13401  
Austin, Texas 78711

OR2013-01375

Dear Ms. Wells:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 476221.

The Texas Board of Pardons and Paroles (the "board") received a request for the last ten application files in which a pardon was granted and the last ten application files in which a pardon was denied, within a specified time period, including information documenting the board's decisions. You state you have withheld portions of the requested information in accordance with Open Records Letter Nos. 2010-16375 (2010), 2001-03026 (2001), and 2000-03696 (2000).<sup>1</sup> You claim the submitted information is excepted from disclosure

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<sup>1</sup>Open Records Letter No. 2010-16375 serves as a previous determination for the board to withhold staff reports pertaining to offenders subject to executive clemency and electronic records maintained in the clemency database and pertaining to offenders subject to executive clemency under section 552.101 of the Government Code in conjunction with section 508.313(a) of the Government Code. Open Records Letter No. 2001-03026 serves as a previous determination for the board to withhold six categories of information maintained by the board as part of clemency applications under section 552.101 in conjunction with section 508.313(a). Open Records Letter Number 2000-03696 serves as a previous determination under section 552.301(a) of the Government Code for the board to withhold petitions for clemency under section 508.313 of the Government Code.

under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note a portion of the submitted information is subject to section 552.022(a)(17) of the Government Code, which provides for the required public disclosure of "information that is also contained in a public court record," unless it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a). You seek to withhold the information subject to section 552.022(a)(17) under section 552.111 of the Government Code. However, section 552.111 is a discretionary exceptions and does not make information confidential under the Act. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). Therefore, the information subject to subsection 552.022(a)(17) may not be withheld under section 552.111 of the Government Code. However, because section 552.130 of the Government Code protects information made confidential under law, we will consider the applicability of this section to the information subject to section 552.022(a)(17).<sup>3</sup> We will also consider your arguments under section 552.111 of the Government Code for the information not subject to section 552.022(a)(17) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues

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<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); see ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. See Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. See ORD 561.

You state the submitted information consists of pardon applications pertaining to individuals who were convicted but never sentenced to a term in prison or subject to parole or mandatory supervision. You state the information at issue is reflective of the deliberative process by which board makes recommendations regarding clemency applications. You explain the board reviews the clemency applications, and based on the recommendation and advice of a majority of the board, the Governor may grant a full pardon to an applicant. We understand the board and the Governor's office share a privity of interest regarding the clemency files and board recommendations. You further explain the board's decision making process pertaining to the type of applications at issue requires "frank and open discussion." Thus, we understand you to claim the information at issue consists of advice, opinions, and recommendations of the board pertaining to the board's recommendations regarding clemency applications. Based on your representations and our review of the information at issue, we find the board has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the board. Thus, the board may withhold the information we marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is general administrative and purely factual information or has been shared with individuals with whom you have not demonstrated the board shares a privity of interest or common deliberative process. Thus, we find you have failed to show how the

remaining information at issue consists of advice, opinions, or recommendations on the policymaking matters of the board. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code.

We note the remaining information contains confidential criminal history record information ("CHRI"). Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses laws that make CHRI confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). *See generally* Gov't Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we find a portion of the remaining information, which we have marked, consists of CHRI that is confidential under section 411.083. Thus, the board must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983)

(sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). This office has also found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the board must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

We note the remaining information, including the information subject to section 552.022(a)(17) of the Government Code, contains motor vehicle record information. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. *See Gov't Code § 552.130*. Accordingly, the board must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Finally, we note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the board must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.<sup>4</sup>

In summary, except as otherwise noted, the board must release the information subject to section 552.022(a)(17) of the Government Code, which we have marked for release. The board may withhold the information we have marked under section 552.111 of the Government Code. The board must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and common-law privacy. The board must withhold the information we

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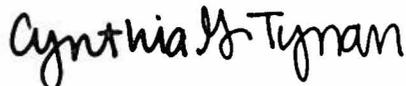
<sup>4</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

have marked under section 552.130 of the Government Code. Unless the owners affirmatively consent to release, the board must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The board must release the remaining information.<sup>5</sup>

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/akg

Ref: ID# 476221

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. See Gov't Code § 552.147(b).